IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE JURISDICTION

WRIT PETITION NO. 6529 OF 2003

Gangadhar Dada Borge ..Petitioner

Vs.

Hirabai Shripati Chowgule
and Ors. ..Respondents

....

Mr.S.M.Railkar for Petitioner
Mr.D.S.Sawant for Respondent Nos.2 and 3

....

CORAM : B.H.MARLAPALLE,J.

DATE : APRIL 4,2005

P.C.:

1. Heard the learned counsel for the petitioner who is the plaintiff in Special Civil Suit No. 2 of 1996 presently pending before the learned Jt.C.J.S.D. at Kolhapur. The issues were framed below Exh.35/B on 21.11.2001 and issue No.1-A reading as under, was added by an order dated 28.11.2002:

. "1-A. Does the plaintiff prove that the suit land was a fragment as alleged ? "

2. The plaintiff filed an application at Exh.53 praying for referring the added issue No.1-A for

adjudication by the Tahsildar, Taluka Shahuwadi and the same application came to be rejected by the learned IInd Jt.Civil Judge S.D. on 19.3.2003. Hence, this petition.

3. The trial Court referred to the definition of 'fragment' under section 2(4) of the Bombay Prevention of Fragmentation and Conciliation of Holdings Act, 1947 and noted that the Issue No.1-A framed subsequently was only regarding the factum of fragmentation. The reasoning given by the trial Court reads as under:

> . " Thus if the suit land has been declared fragment then there must be such entries of fragment in the record of right so the fact of fragment of suit land can be proved by the documents of record of right and other documents prepared under the Provisions of the Act. In the Act, there is no proof that the Tahsildar has authority to determine the issue of fragment and therefore, there is no need to refer the issue No.1-A to the Tahsildar for determination and findings".

4. The learned counsel for the petitioner referred to the scheme of Section 36-A and 36-B of the Act and also the decision in the case of *Shevantabai Maruti Kalhatkar Vs. Ramu Rakhamaji Kalhatkar and another*

[1998 (8) S.C.C.76].

5. As noted earlier, the factum of fragment can be proved by record or the documents of record of rights and it does not call for adjudication. Similarly, the Tahsildar has no powers to adjudicate upon such an issue. If the issue framed at 1-A is answered in the negative or in the affirmative, consequences will follow. The order impugned is supported by proper reasoning and it cannot be termed as perverse or patently illegal. No interference is called for in the said order under Article 227 of the Constitution of India. Petition is rejected summarily. Interim order stands vacated.

[B.H.MARLAPALLE,J.]